Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

BRYAN G. HOLE and ERIC E. GONZALEZ,
Petitioners,

v.

TEXAS A&M UNIVERSITY; ROBERT GATES; DAVID PARROT; MICHAEL COLLINS; LAURA SOSH-LIGHTSY; and JACQUIE VARGAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether attorney's fees can ever constitute a legally-cognizable injury under §1983.

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The decision of the court of appeals is not officially reported but is available at 2010 WL 148656 (C.A.5. (Tex.) January 13, 2010) and is reproduced in the Appendix herein at 1a-7a. The Memorandum Opinion and Order of the U.S. District Court for the Southern District of Texas - Brownsville Division is not published. However, a copy is reproduced in the Appendix at 8a-27a.

JURISDICTION

The Opinion and judgment of the court of appeals was issued on January 13, 2010. Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was

violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Due Process Violations

During the Fall 2002 semester at Texas A&M University ("TAMU") and thereafter, Respondents, in their individual and/or official capacities, initiated, conducted and/or directly oversaw an investigation concerning the Parsons' Mounted Cavalry ("PMC"), a student organization at TAMU. Pet. App. 53a-58a. During such investigation, the Respondents in their individual capacities, violated Petitioners' (and those of other PMC students) rights under the United States Constitution. *Id.*

After the "investigation" was completed, late in the Spring 2003 semester, the Respondents in their individual capacities began an organized and concerted effort to rapidly conduct some seventy-seven student disciplinary hearings. Pet. App. 59a. Such hearings were conducted in a manner which ignored Petitioners' clearly established due process rights guaranteed them by the Fourteenth Amendment to the United States Constitution. *Id.*

For example, students were given very short notice of the inflexible hearing dates, which were held during "finals week." Pet. App. 60a-63a. The notices were generic and provided the Petitioners (and other involved students) no specifics as to the nature of the

charges against which they were to defend. *Id.* Additionally, Petitioners were told they had no right to have a representative of their own choice with them at the hearing; no right to consult with counsel; and no right to cross-examine the witnesses against them. *Id.* Furthermore, Petitioners were placed under a "gag order", and were forbidden from talking to potential witnesses, their parents or their attorneys; Petitioners were not advised of the identity of the witnesses against them; Petitioners were told that if they did not testify, they would be found guilty; secret, undisclosed, evidence was used against the Petitioners; guilt by association was utilized; students were disciplined for past conduct that was not proscribed at the time it occurred; students were sanctioned without substantial evidence; the Respondents that conducted the investigations and advised the University that violations had taken place, were designated as the hearing officers; no neutral fact-finders were afforded to the students; and predetermined punishments were imposed. *Id.* In short, Petitioners had no way of being prepared to defend themselves against the nebulous charges, and virtually no chance of continuing their education at TAMU.

As a result of Respondents' actions, in the days immediately prior to Petitioners' scheduled hearings, numerous PMC students were severely sanctioned by TAMU and Respondents. Pet. App. 68a-69a. Such severe sanctions included dismissals and suspensions from TAMU. *Id.* Prior to Petitioner Hole's hearing, of the 17 students similarly situated who had already had their hearings, 100% of those students were either given suspensions or separations from TAMU. *Id.* Additionally, both Petitioners were designated on a written memo as "Potential Separation", *prior* to their

hearings. *Id.* (Yet when Petitioners argued that had they *not* sued they would have been sanctioned, the Fifth Circuit characterized such argument as "speculative".)

B. The Actions Taken to Stop the Denials of Due Process

On April 25, 2003, hours before his hearing, in an effort to obtain the due process to which he was entitled, Petitioner Hole filed a petition in state court and sought a temporary restraining order ("TRO") to stop the unconstitutional hearings and sanctions. Pet. App. 9a. The state trial court found that the individual Respondents and TAMU had denied Petitioner Hole's clearly established statutory or constitutional rights, of which a reasonable person would have known, and found that if such actions were not immediately restrained, Petitioner Hole would suffer irreparable harm. *Id.* The state trial judge issued a TRO, restraining the University and its employees (including Respondents) from proceeding with the disciplinary proceedings, and restraining the University and its employees, including Respondents, from imposing sanctions against those students whose disciplinary proceedings had already been held. *Id.*

On or about August 13, 2004, after a lengthy evidentiary trial, a final judgment was entered in the state court action. Pet. App. 29a-49a. The trial court specifically found numerous due process violations, and permanently enjoined TAMU and its employees, including Respondents, from proceeding with the constitutionally–flawed investigations and hearings against Petitioners. Pet. App. 38a-39a. The trial court found that if the Respondents herein were not

enjoined, Petitioners would suffer irreparable harm and damages. *Id.* However, rather then comply with the state court rulings, and properly perform the investigations and properly conduct the hearings, TAMU appealed the final judgment. Pet. App. 3a.

C. The Filing of the §1983 Complaint

While the appeal was pending, Petitioners Bryan G. Hole and Eric E. Gonzalez filed their Original Complaint in the United States District Court for the Southern District of Texas – Brownsville Division, pursuant to 42 U.S.C. §1983, seeking to recover the economic damages they suffered as a result of the individual Defendants' unconstitutional actions. Pet. App. 3a. The basis for federal jurisdiction was 28 U.S.C. §1331.

At the time that Petitioners filed their Original Complaint, Petitioners were students in good standing at Texas A&M University, a state-funded university; Respondent Gates was President of Texas A&M University; and Respondents Parrot, Collins, Lightsy, and Vargas were employees of the Texas A&M University's Student Life Services. Pet. App. 53a.

D. The Dismissal of Federal Court Suit

On April 26, 2006, the judgment of the state court was reversed by a state appellate court (not on the merits). Pet. App. 3a. A Petition for Review to the Supreme Court of Texas was denied on February 23, 2007. *Id.*

On July 24, 2007, Petitioners filed Plaintiffs' First Amended Original Complaint. Pet. App. 50a-67a. In

response, Respondents filed a Rule 12(c) Motion to Dismiss and Brief in Support of Motion to Dismiss. Based almost exclusively on the fact that the state court suit was dismissed, the district court granted such motion. Pet. App. 3a-4a. The Fifth Circuit Court of Appeals affirmed the dismissal. Pet. App. 7a.

REASONS FOR GRANTING THE WRIT

The law in the Fifth Circuit prevents a claimant who is being denied due process by a person under color of law from recovering their damages under §1983, *if* those damages consist of the attorney's fees incurred to obtain due process. This is an important question of federal law that has not been, and should be, settled by this Court.

"Restoration of the pecuniary interest suffices to return a plaintiff to her prior circumstances." *Akin, Gump, Straus, Hauer & Feld v. National Dev. and Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009). "When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed." *Id.* (citing the Restatement (Second) of Torts §903 cmt. A (1977)).

In Plaintiffs' First Amended Original Complaint, Petitioners sued under §1983 (not §1988, as reported by the Fifth Circuit - Pet. App. 3a) to recover their damages including, but not limited to, the attorney's fees and expenses that were incurred by them in their effort to halt the violations of their due process rights. Pet. App. 64a. The damages (including attorney's fees) being sought by Petitioners are damages that were

directly sustained by the Petitioners as a result of the due process violations. They are *not* the attorney's fees incurred in connection with the prosecution of this civil action [which would be governed by § 1988], nor do they require a successful prosecution of the underlying action.

The attorney's fees and costs incurred to stop the unconstitutional actions are compensatory damages, and constitute an injury-in-fact because they were necessarily incurred to prevent further due process violations and to ensure that Petitioners received the due process protections guaranteed them by the United States Constitution.

It is fundamentally unjust that Petitioners, who have been financially damaged by Respondents' §1983 violations, should not be entitled to be compensated simply because their damages were in the form of attorney's fees. There is no doubt that if a due process violation required a claimant to seek the advice of a doctor, an accountant, an engineer or some other professional, the fees charged by such professional would, if caused by the violation, be recoverable.

The Fifth Circuit opinion allows for the disparate treatment of attorney's fees from other professional fees, and eviscerates Petitioners' opportunity for redress. In doing so, the Fifth Circuit has also ignored this Court's guidance that "[t]he recovery of such expenses unrelated to litigation would assuredly support Article III standing. . . ." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 108 (1998). However, the Fifth Circuit inappropriately applied this Court's holding in *Steel,* to justify its erroneous

dismissal, based solely on the pleadings, of Petitioners' §1983 claims for compensatory damages.

Although it recognized that the facts in the instant case differed considerably from the facts in *Steel* and *Lopez v. Houston Ind. Sch. Dist.*, No. 04-20604, 124 Fed.Appx 234, 2005 WL 176293 (C.A.5 (Tex.) July 28, 2004)(*not designated for publication*), the Fifth Circuit still relied on the general principle noted in those opinions that "a party who voluntarily initiates litigation and does not win a judgment, cannot then sue to recover attorney's fees as a compensable injury." *Hole v. Texas A&M University*, 2010 WL 148646 (C.A. 5 (Tex.) Jan. 13, 2010); Pet. App. 1a-7a.

The Fifth Circuit Opinion not only ignores the fact that the initiation of litigation was not voluntary (instead it was necessary to preserve Petitioners' civil rights), but also that Petitioners *did* obtain the relief sought, as the constitutionally-flawed processes were halted. Pet. App. 29a-49a.

As a result of the initiation of constitutionally-infirm disciplinary proceedings against Petitioners by Respondents, in their individual capacities, Petitioners had no choice but to use all means legally available to them to protect their constitutional rights to due process. They did this by filing an unrelated application for a temporary restraining order in a state court in Brazos County. Pet. App. 9a. Such application and litigation was successful in halting the continued deprivation of their due process rights, and it was alleged in the instant case that such actions prevented Petitioners' (and the remaining PMC students') lives and livelihoods from being

substantially destroyed by the one-sided sham hearings. Pet. App. 51a-67a.

Subsequent to the temporary restraining order, Petitioners were required to file applications for temporary and permanent injunctions in the state court action, in order to prevent the continuation of the individual Respondents' attacks upon Petitioners' basic constitutional rights. Pet. App. 9a-10a. Numerous depositions were taken in Brazos County and an extensive amount of discovery was conducted in order to protect Petitioners' rights from being denied by Respondents. All the while, the individual Respondents in their individual capacities maintained an indifferent attitude to the ongoing violations.

Respondent Gates (then-President of TAMU) noted that, even if he was convinced that the Petitioners' rights to due process were being violated, he would allow the process to continue. Even more disturbing is the fact that, once the state court found, without a doubt, that Respondents' conduct was unconstitutional, the Respondents failed to heed the judicial determinations, and the judgment was appealed, further damaging Petitioners. Pet. App. 3a.

At no time did such constitutionally-flawed proceedings continue, as Petitioners were successful in stopping them. In the instant case, had steps to obtain due process not been taken, Petitioners would have lost their careers as military officers, and would have lost their chosen livelihoods. However, they would have then, according to the Fifth Circuit, suffered an "injury-in-fact" upon which they could sue under §1983. When this was pointed out in briefing to the Fifth Circuit, it stated as follows:

> In addition, Appellants argue that the threat of disciplinary sanctions left them no choice but to sue. Appellants' argument assumes that Appellees' disciplinary process would inevitably have led to sanctions, and that these sanctions would have violated Appellants' constitutional rights. *This argument is speculative, and we do not accept it as true.*

Pet. App. 6a. (Emphasis added). (Even though 100% of the similarly situated students who underwent the process before it was halted received precisely those sanctions. Pet. App. 68a-69a.)

However, to survive a Rule 12(c) motion, a complaint must allege "sufficient factual matter, **accepted as true**, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)(emphasis added)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). Clearly, any doubt should have been an issue for a trial. Petitioners have been denied their opportunity to demonstrate to a jury, as they did to the trial judge in state court, that this argument is *not* speculative. The Fifth Circuit Opinion deprives Petitioners of that opportunity because the Fifth Circuit does not accept Petitioners' allegations "as true."

Under Rule 12(c), "[t]he issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Thus a court should not dismiss a claim [under Rule 12(c)] unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove, consistent with the allegations in the complaint." *Great Plains Trust Co. v. Morgan Stanley*

Dean Witter & Co., 313 F.3d 305, 313 (5th Cir 2002). In short, the Fifth Circuit holds that, since *it* does not believe the allegation, Petitioners do not get a trial.

The Fifth Circuit evidently believes that Petitioners should have allowed these catastrophic events to have occurred, and unless they were allowed to occur, Petitioners would not have suffered an injury-in-fact. Petitioners did suffer injuries-in-fact – the damages they suffered which directly flowed from the individual Defendants' wrongful conduct in violation of Petitioners' constitutional rights, which include the attorney's fees, court costs and expenses incurred by Petitioners to protect their constitutional rights.

Citing *Steel* and *Lopez*, the Fifth Circuit Court of Appeals' Opinion correctly notes that Petitioners cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing suit. Petitioners agree. However, *Steel* and *Lopez* are inapplicable to the facts of this case. In *Steel*, the United States Supreme Court was faced with a private enforcement action alleging that the petitioner violated the EPRCA by failing to file toxic and hazardous chemical storage and emission reports. *Steel*, 523 U.S. at 86. The complaint in *Steel* specifically sought "an award of all respondent's costs, in connection with the investigation and prosecution *of this matter,* including reasonable attorney and expert witness fees, as authorized by Section 236(f) of [EPCRA]". *Id.* (emphasis added).

Unlike *Steel*, in the instant case Petitioners are <u>not</u> bringing their Section 1983 action in federal court to recover the costs of bringing their Section 1983 action. The Respondents, the District Court and the Fifth

Circuit Court of Appeals all fail to understand the fact that Petitioners are seeking to recover, as part of their *compensatory damages*, the attorney's fees and costs which were *necessarily incurred* in order to successfully thwart, or at least minimize, the devastating effects of the individual Respondents' actions to deprive Petitioners of their Constitutional rights. These previously-incurred economic damages are separate and distinct from any attorney's fees that are presently being incurred in connection with this civil action.

More importantly, what the lower courts failed to acknowledge concerning this Court's Opinion in *Steel* was that the respondent in *Steel* asserted that the "investigation costs" were incurred prior to the litigation, which the Court noted would "assuredly support Article III standing" but for the fact that respondent's entitlement to attorney's fees in *Steel* was based on a specific statute that only permitted recovery of the costs of litigation. *Id.* Utilizing the dicta in *Steel*, Petitioners are assuredly entitled to recover the damages they suffered at the hands of the individual Respondents, **prior to <u>this</u> litigation** – which include the attorney's fees and costs that the Petitioners incurred in order to protect their constitutional rights and mitigate their damages.

At the time that Petitioners initiated the underlying civil action, both Petitioners were enrolled as students at TAMU and had contracts to join the United States Marine Corps and the United States Army, respectively, upon graduation. Petitioners suffered significant hardship and incurred numerous expenses, including attorney's fees, litigation expenses and court costs, in order to successfully halt the

blatant due process violations which Petitioners endured at the hands of the individual Respondents acting in their individual capacities. Obviously, a University, a police department, a municipality, or anyone else acting under color of law, has many more resources available to them than the average individual citizen that is being denied due process.

It was clear from the outset that the Respondents' goal in this case was to wear Petitioners down, making it so expensive that Petitioners would have to give up seeking due process. Should the ruling of the Fifth Circuit be allowed to stand, the inexcusable, unconscionable and unconstitutional actions of Respondents will prevail, and all of Petitioners' efforts to make the system work in accordance with the United States Constitution will be for naught. Simply because Petitioners' damages are "attorney's fees", they are not considered recoverable. No such distinction should exist.

Clearly, Petitioners have alleged injuries-in-fact that were directly connected to the due process violations suffered at the hands of Respondents, and there cannot be any serious doubt that a monetary judgment in this case would redress that portion of Petitioners' injuries. Because the due process violations were in the context of judicial proceedings, a lawyer would almost certainly be necessary. Accordingly, Petitioners established an actual injury, which is directly connected to the individual Respondents' due process violations, with a high likelihood that the damages requested in this action will redress such actual, existing, palpable economic injuries. Dismissing the instant case on the pleadings, without affording Petitioners the opportunity to

present evidence and fully litigate this matter, thwarts the statute's purpose.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-40311

[Filed January 13, 2010]

BRYAN G. HOLE; ERIC E. GONZALEZ,	)
	)
Plaintiffs–Appellants	)
	)
v.	)
	)
TEXAS A&M UNIVERSITY; ROBERT GATES; DAVID PARROT; MICHAEL COLLINS; LAURA SOSH-LIGHTSY; JACQUIE VARGAS,	)
	)
Defendants–Appellees	)

Appeal from the United States District Court
for the Southern District of Texas
No. 1:04-CV-00175

Before HIGGINBOTHAM, GARZA, and PRADO, Circuit Judges. PER CURIAM:*

Appellants Bryan G. Hole and Eric E. Gonzalez voluntarily incurred attorney's fees and costs in a state court action which they initiated and eventually lost. Now, Appellants argue that these attorney's fees and costs are sufficient to establish injury under 42 U.S.C. § 1983. We disagree. Further, we find that Appellants do not sufficiently allege any injury other than attorney's fees and costs, and do not have access to attorney's fees under 42 U.S.C. § 1988. Accordingly, we AFFIRM the district court's dismissal of their claims.

I. BACKGROUND

The Parsons Mounted Cavalry ("PMC") is a student organization at Texas A&M University ("TAMU"). Appellees, which include TAMU and several of its officers, received a complaint that PMC members were hazing recruits. Appellees initiated disciplinary proceedings against numerous PMC members, including Appellants. Before Appellees completed any disciplinary hearings, Appellants and others filed suit in state court, alleging constitutional violations. The state court enjoined Appellees from pursuing disciplinary actions against Appellants or enforcing any sanctions previously assessed. Later, the state court issued a judgment in Appellants' favor.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellees appealed to the Texas Court of Appeals, which reversed on the ground that Appellants' suit was not yet ripe. *Tex. A&M Univ. v. Hole*, 194 S.W.3d 591, 593 (Tex. App.—Waco 2006, pet. denied). The Texas Court of Appeals reasoned that because no Appellant had actually completed TAMU's disciplinary process, there was no legally-cognizable injury. *Id.* The Supreme Court of Texas declined to review the case. *Hole v. Tex. A&M Univ.*, No. 10-04-00287-CV, 2007 Tex. LEXIS 173, at *1 (Tex. Feb. 23, 2007).

After the state trial court ruled in Appellants' favor, but before the Texas Court of Appeals reversed, Appellants filed suit in the United States District Court for the Southern District of Texas, seeking injunctive relief under § 1983, compensatory damages under § 1988 including attorney's fees and expenses, and declaratory relief under 28 U.S.C. § 2201. The district court stayed proceedings pending the outcome of the state court appeal.

After the Texas Court of Appeals reversed the state trial court's ruling, the district court resumed its proceedings. Appellees filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), which the district court granted. The district court reasoned that "the dispute between the parties . . . never ripened into an actual case or controversy because [Appellants] did not suffer an injury-in-fact from [Appellees'] complained-of conduct." *Hole v. Tex. A&M Univ.*, No. 4-175, slip op. at 4 (S.D. Tex. Feb. 10, 2009). The district court noted that the combination of Appellants' graduations from TAMU and the Texas Court of Appeals' dismissal of Appellants' suit rendered moot any injunctive or declaratory relief. *Id.* Further, the district court stated that because

Appellants did not prevail in the state court action, they were not permitted to receive attorney's fees under § 1988. *Id.*

Appellants appeal only the district court's finding that there was no injury.

II. ANALYSIS

We have jurisdiction over an appeal of the district court's final ruling under 28 U.S.C. § 1291. We review *de novo* a Rule 12(c) motion for judgment on the pleadings. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). To survive a Rule 12(c) motion, a complaint must allege "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d at 205 (stating that the standard for a Rule 12(c) motion is the same as that for a Rule 12(b)(6) motion). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the pleader has failed to show that he "is entitled to relief," and dismissal is appropriate. *Iqbal*, 129 S. Ct. at 1950.

As an initial matter, Appellees argue that Appellants waived their right to challenge the district court's ruling on mootness and ripeness because Appellants stated that they were only appealing the district court's conclusion that they did not allege a legally-cognizable injury under § 1983. It is true that Appellants said they were only appealing the district court's decision that they did not state a claim under § 1983, but ripeness and mootness are related to this

determination. Thus, Appellants did not waive their right to challenge the district court's ruling on these issues.

A. Whether Appellants' Attorney's Fees and Costs Constitute a Legally-Cognizable Injury under § 1983

To have standing under § 1983, a plaintiff must suffer a legally-cognizable injury. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984). Here, the district court found that Appellants' state court attorney's fees and costs do not constitute a legally-cognizable injury. We agree.

Appellants argue that the cases the district court relies on—*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) and *Lopez v. Houston Independent School District*, 124 F. App'x 234 (5th Cir. 2005) (per curiam)—are distinguishable. It is true that these cases are not entirely on point factually. In *Steel*, the petition sought costs and attorneys fees incurred in the "prosecution *of this matter*," 523 U.S. at 105 (emphasis added), while in the instant case Appellants argue that their injury stems from attorney's fees incurred in the state action. Likewise, in *Lopez*, the federal court plaintiff was the attorney for the state court plaintiff, 124 F. App'x at 235–36, while here the federal court plaintiffs were the plaintiffs in state court.

Although factually distinct, *Steel* and *Lopez* inform the general principle that a party who voluntarily initiates litigation and does not win a judgment, cannot then sue to recover attorney's fees as a compensable injury. *See Steel*, 523 U.S. at 86 ("[A]

plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."); *Lopez*, 124 F. App'x at 236 (explaining that attorney's fees incurred by a party who did not win the underlying suit are not a legally-cognizable injury). "[T]he mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III." *Diamond v. Charles*, 476 U.S. 54, 70–71 (1986).

In addition, Appellants argue that the threat of disciplinary sanctions left them no choice but to sue. Appellants' argument assumes that Appellees' disciplinary process would inevitably have led to sanctions, and that these sanctions would have violated Appellants' constitutional rights. This argument is speculative, and we do not accept it as true.

B. Whether Appellants Allege Damages other than Attorney's Fees and Costs

In their Amended Complaint, Appellants allege that "[a]s a result of [Appellees'] conduct and actions, [Appellants] suffered damages. Such damages include the attorneys' fees and expenses that were incurred by [Appellants] to protect their constitutional rights." Now, Appellants argue that the word "include" is intended to indicate that the attorney's fees and expenses were not an exhaustive list of their damages. Although the Amended Complaint hints at other damages—injuries to Appellants' reputations, liberty interests, and educations—these hints do not reach the level of specificity required in a complaint. *Iqbal*, 129

S. Ct. at 1950. Accordingly, Appellants fail to allege sufficiently any cognizable damages.

C. Whether Appellants May Recover Attorney's Fees under § 1988

Under § 1988, a party that wants to recover attorney's fees incurred in a prior proceeding must have prevailed in that proceeding. 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce [§ 1983] a court, in its discretion, may allow the *prevailing party* . . . a reasonable attorney's fee as part of the costs . . . .") (emphasis added); *Castellano v. Fragozo*, 311 F.3d 689, 711 (5th Cir. 2002), *reh'g granted*, 321 F.3d 1202 (5th Cir. 2003). To be a prevailing party under § 1988, a plaintiff must obtain actual relief, such as an enforceable judgment. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). Here, Appellants did not obtain actual relief. Although the state trial court granted Appellants injunctive relief and ruled in their favor, the Texas Court of Appeals reversed. Thus, Appellants do not have an enforceable judgment, are not the prevailing party, and do not have access to attorney's fees under § 1988.

III. CONCLUSION

Appellants' state court attorney's fees and costs do not constitute sufficient injury to establish standing under § 1983. Further, Appellants do not sufficiently allege any injury other than their state court attorney's fees and costs. Finally, Appellants do not have access to attorney's fees under § 1988 because they did not prevail in state court. Accordingly, we AFFIRM the district court's ruling.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
—BROWNSVILLE DIVISION—

CIVIL ACTION NO. 04-CV-175

[Filed February 10, 2009]

BRYAN G. HOLE and ERIC GONZALEZ, Plaintiffs,	)
v.	)
TEXAS A&M UNIVERSITY; ROBERT GATES, Individually and in His Official; Capacity; DAVID PARROT, Individually and in his Official Capacity; MICHAEL COLLINS, Individually and in his Official Capacity; LAURA SOSH-LIGHTSY, Individually and in her Official Capacity; JACQUIE VARGAS, Individually and in her Official Capacity, Defendants.	)

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

At the time this suit was commenced in federal court on September 30, 2004, Bryan G. Hole and Eric

E. Gonzalez, ("Plaintiffs") were students at Texas A&M University ("TAMU or the "University") and members of the Parsons Mounted Calvary (the "PMC"), a special unit of the TAMU Corps of Cadets. They have since graduated.[1] Defendant TAMU is a state university of the State of Texas. Defendant Gates was President of TAMU at the time the events giving rise to this suit transpired. Defendants Parrot, Collins, Lightsy, and Vargas worked in TAMU's Student Life Services – the entity at TAMU responsible for, among other things, holding student disciplinary proceedings.

TAMU initiated disciplinary proceedings against Plaintiffs in April 2003 for alleged violations of the Student Conduct Code concerning a report of hazing within the PMC during October 2002. Before Plaintiff Gonzalez received his hearing with TAMU officials, and prior to filing this suit in federal court, he sought relief in the 272nd Judicial District Court of Brazos County, Texas. Specifically, he filed a petition seeking a Temporary Restraining Order ("TRO") which the trial court granted. *See Texas A&M Univ. v. Hole*, 194 S.W.3d 591, 592 (Tex. App. – Waco 2006, pet. denied). The trial court then issued an additional TRO which stopped all PMC-related hearings, all university appellate proceedings, and the enforcement of any sanctions already assessed. *See id.* That order was entered before any student exhausted the university's appellate process. *See id.*

Additional students (including Plaintiff Hole) filed suit and the actions were consolidated with the

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[1] Plaintiff Hole graduated in May 2006; Plaintiff Gonzalez graduated in August 2005. *See* Pls.' Resp. ¶24.

Gonzalez suit. *See id.* Eventually, twenty-three plaintiffs sought relief from the trial court in the form of a permanent injunction enjoining TAMU from continuing with the student-disciplinary process and a declaration under the Uniform Declaratory Judgments Act as to provisions of the Student Conduct Code, Student Rules, and student-disciplinary process. *See id.* Based in part on findings that the University's disciplinary proceedings did not comport with Texas due course of law standards,[2] the state district judge issued a temporary injunction, and later a permanent injunction,[3] that permanently enjoined TAMU from enforcing the sanctions previously assessed against the plaintiffs by the University and from pursuing any

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[2] The Texas state due course of law standard is informed by case law outlining the Due Process clause of the Fourteenth Amendment to the United States Constitution. *See University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) ("[w]hile the Texas Constitution is textually different in that it refers to 'due course' rather than 'due process,' we regard these terms as without meaningful distinction").

[3] The permanent injunction issued by the state district judge provides in pertinent part that:

> [a]ccordingly, in light of all of [sic] credible evidence, the law and the court's rulings pursuant to the Texas Declaratory Judgment Act, it is hereby . . . ORDERED, ADJUDGED and DECREED that defendant TEXAS A&M UNIVERSITY is permanently enjoined from disciplining plaintiffs for alleged misconduct that occurred prior to October 2002. . . .

Bryan G. Hole, et al. v. Texas A&M University, Cause No. 03-00858-CV-272, 272nd District Court, Brazos County, Texas, Final Judgment at 8-9.

further disciplinary action against the students for conduct that occurred prior to October 2002. *See id.*

On September 30, 2004, after entry of the final judgment against Defendants in state court, Plaintiffs filed this action in federal court, seeking injunctive and declaratory relief, as well as economic damages comprised solely of the attorney fees and costs necessitated by protecting their constitutional due process rights in state court. *See* Pls.' Resp. 712. After Plaintiffs commenced this federal suit, Defendants appealed the state court's final judgment. On January 14, 2005, finding that the issues in the state court case were "substantially identical" to those pending in the federal suit, United States Magistrate Judge John Wm. Black, with the agreement and consent of the parties, abated the federal suit until the conclusion of the appeals process in state court (DE 29); *see also* Tr. Jan. 15, 2005 Pretrial Conf. Hrg. at 16- 18 (DE 66).

On appeal in state court, the case was dismissed for lack of subject matter jurisdiction on the ground that because Plaintiffs had never completed TAMU's disciplinary proceedings, they had no concrete injury and thus, the case was not ripe for adjudication. *See Hole*, 194 S.W.3d at 593. The state Court of Appeals also held that "[s]eeking a declaration of rights under the Uniform Declaratory Judgments Act is not sufficient to avoid the ripeness doctrine." *Id.* The Supreme Court of Texas declined to review the case on February 23, 2007.

II. PROCEDURAL HISTORY

On July 24, 2007, after the state court process had completely run its course, Plaintiffs filed an amended

complaint in this Court (DE 41), seeking to revive their federal claims. Currently pending before this Court is Defendants' "12(c) Motion to Dismiss [sic]"(DE 50), filed on January 4, 2008. The Court construes Defendants' Motion as a Rule 12(c) "Motion for Judgment on the Pleadings" (the "Motion"). Fed.R.Civ.P. 12(c). With leave of Court, Plaintiffs filed a response to Defendants' Motion on February 21, 2008 (DE 53). The Defendants' reply followed on April 4, 2008 (DE 57). Plaintiffs filed a sur-reply on October 2, 2008 (DE 60). Thus, the issue of whether judgment on the pleadings is appropriate has been fully briefed and is ripe for the Court's consideration. Having conducted its own standing analysis, this Court also finds the dispute between the parties to the instant federal action never ripened into an actual case or controversy because Plaintiffs did not suffer an injury-in-fact from the Defendants' complained-of conduct.

Further, even assuming Plaintiffs' suit was ripe at the time it was filed in federal court, the combination of Plaintiffs' intervening graduations and the subsequent state Court of Appeals' dismissal of Plaintiffs' suit (based on the same operative facts) for lack of ripeness renders any current need for injunctive or declaratory relief moot. Given that ruling, the only remaining live issue in this Court would be Plaintiffs' claim for compensatory damages under 42 U.S.C. § 1983 based on the attorneys fees incurred in the underlying state litigation. The Court finds, however, that assuming that claim is ripe, Plaintiffs have not stated facts entitling them to those damages since they did not ultimately prevail in state court. Therefore, the Court is of the opinion that Defendants' Motion should be granted.

III. STANDARD OF REVIEW FOR 12(C) MOTIONS FOR JUDGMENT ON THE PLEADINGS

Rule 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). The Fifth Circuit set out the standard of review and controlling law for motions made under Rule 12(c) in *Great Plains Trust Co. v. Morgan Stanley Dean Witter Co.*, 313 F.3d 305, 312-14 (5th Cir. 2002). The standard of review under Rule 12(c) is the same as that under Rule 12(b)(6) or 12(h)(2). *See Great Plains*, 313 F.3d at 313 n. 8. The court should construe the pleadings liberally and should grant a Rule 12(c) motion only when there is no disputed issue of fact and there are only questions of law. *See id.* at 312. A claim may be dismissed when it is clear that the plaintiff "can prove no set of facts in support of his claim that would entitle him to relief." *Id.* at 312 (citing *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)). The court must accept all well-pleaded facts as true and view them in a light most favorable to the plaintiff. *See id.* at 312-313. Conclusory allegations and unwarranted deductions of fact are not accepted as true and will not preclude dismissal. *See id.* at 313 (citing *Edmond v. Collins*, 8 F.3d 290, 292 n. 5 (5th Cir. 1993) (addressing Rule 12(b)(6) standard)). The question is not whether the plaintiff will ultimately prevail, but whether he may present evidence in support of his claim. *See id.* (citing *Jones*, 188 F.3d at 324). Thus, the court should not dismiss the claim unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint. *See id.*

IV. PLAINTIFFS' FACTUAL PLEADINGS

The relevant "pleading"9 for purposes of this Rule 12(c) Motion for Judgment on the Pleadings is Plaintiffs' latest amended complaint (DE 41). Plaintiffs' response to Defendants' Motion and the exhibits attached thereto (DE 53), and Plaintiffs' sur-reply to Defendants' reply (DE 60) are also being considered.

A. Due Process Allegations

On April 11, 2003, TAMU's Student Life Services sent Plaintiffs letters informing them that they were being charged with violations of certain University Student Rules relating to October 2002 reports of hazing within the Parsons Mounted Calvary unit of the Corps of Cadets. *See* Pls.' Am. Compl. at ¶ 19. The letters, received by Plaintiffs on April 15th, did not state the specific conduct that was being called into question; instead, they provided a list of purported rule violations. *See id.* In the same letter Plaintiffs were informed that: (1) an administrative hearing was scheduled for April 28th at 9:00 am; (2) they could review their case file – "to allow [them] time to read the materials the [U]niveristy [] utilized in issuing disciplinary charges" – on April 23rd; and (3) a pre-hearing was scheduled on April 24th for Plaintiff Gonzalez; April 25th for Plaintiff Hole. Pls.' Resp. Ex.'s B and K. Plaintiff Gonzalez' attorney requested that the April 28th administrative hearing be postponed for three reasons: (1) Gonzalez was in the middle of studying for final exams (which began on May 2nd); (2) he did not have adequate time to prepare a defense given that over 70 people were alleged to have information about the charges; and (3) the allegations,

if proved, could obviate Gonzalez' contract with the United States Army, scheduled to begin upon his graduation. See *id.* at Ex. C. Defendant Lightsy, Assistant Director of Student Life Services, responded that "Mr. Gonzalez may request a change in his hearing date; however his request will be denied." *Id.* at Ex. D. Plaintiff Hole retained counsel on April 24th, and received a similar denial of a similar request for additional time, despite the hearing's close proximity to final exams, and the potential obviation of his contract to join the United States Marine Corps upon graduation. Plaintiffs allege that collectively, these circumstances denied them effective assistance of counsel, adequate opportunity to review the evidence against them, adequate time to prepare a defense, and a meaningful hearing. *See generally*, Pls.' Am. Compl. ¶ 19 (reciting laundry list of constitutional rights, privileges and/or immunities allegedly belonging to Plaintiffs and violated by Defendants).

Plaintiffs allege several other flaws in TAMU's disciplinary hearing process. Specifically, they allege that (1) they were charged with violations of rules not in existence at the time of the alleged improper conduct, *see* Pls.' Am. Compl. ¶ 19 C; (2) Defendants predetermined the general range of sanctions Plaintiffs would receive, *see id.* at ¶ 19 D; (3) Plaintiffs were denied neutral or unbiased fact finders in connection with their disciplinary hearings by the hearing officers, Defendants Collins, Lightsy and Vargas, and their supervisor, Defendant Parrot, all of whom were under the supervision of Defendant Gates, *see id.* at ¶ 19 K; and (4) Plaintiffs were denied their right to remain silent by the hearing officers, where Defendant Lightsy stated that "[i]f you remain silent throughout the entire – if you remain silent in

addressing the charges – then they will sanction you because that's just the way its done." Pls.' Resp. Ex. A (testimony of Plaintiff Hole at state court trial discussing his conversation with Defendant Lightsy at his pre-hearing); *see also* Pls.' Am. Compl. ¶ 19 L. Finally, Plaintiffs allege that they were denied access to all the evidence Defendants were using against them in the disciplinary hearings. *See* Pls.' Am. Compl. ¶ 19 J.

B. First Amendment Allegations

Plaintiffs also allege that Defendants Gates, Parrot, Collins, and Lightsy violated Plaintiffs' right to freedom of speech and assembly by authorizing and/or participating in an investigation which prohibited Plaintiffs from gathering to discuss the charges against them with anyone, including each other and their parents. *See* Pls.' Am. Compl. ¶¶ 19 A-B. Specifically, Plaintiffs were required to sign an honor statement that obligated them to seek permission from their PMC supervisor, Colonel Shady Groves, before discussing the charges against them with anyone. *See* Pls.' Resp. Ex. S (testimony of Col. Shady Groves during state court trial).

C. Declaratory Relief Allegations

Plaintiffs claim that they continue to "have substantial doubts and uncertainties as to their rights and legal relations with [TAMU] under the Student Conduct Code and under the rules and regulations at [TAMU]." Pls.' Am. Compl. ¶ 23. Specifically, Plaintiffs allege that they "plan to attain post-graduate degrees at TAMU." *Id.* at ¶ 25. In turn, according to Plaintiffs, this would open the door for TAMU to re-commence

disciplinary proceedings against them, and put them at risk of (1) having their diplomas revoked, (2) losing a semester's worth of tuition and fees, and (3) causing a deleterious effect upon Plaintiffs' reputation, honor, good name, and employment opportunities. *See* Pls.' Resp. ¶ 25. Plaintiffs further claim that "the Student Conduct Code as revised in 2002, is "overly broad and unconstitutionally vague, as written or as applied, thereby failing to advise the students as to what conduct is prohibited under the Code[, . . . and failing to] provide students with clearly established due process when the range of sanctions includes expelling, suspending or dismissing the student from the University." *Id.*

V. ANALYSIS

A. Ripeness

Ripeness is a threshold issue, and peculiarly a question of timing, that implicates subject-matter jurisdiction and emphasizes the need for a concrete injury. *See Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 n. 12 (5th Cir. 2008). The Supreme Court has stated that "the key considerations for ripeness are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 545 (citing *Abbott Labs. Gardner*, 387 U.S. 136, 149 (1967)). "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Id.* "[E]ven where an issue presents purely legal questions, the plaintiff must show *some hardship* in order to establish ripeness." *Cent. & Sw. Servs. v. EPA*, 220 F.3d 683, 690 (5th Cir. 2000) (emphasis added). In the instant case,

Defendants assert this case is not ripe and that Plaintiffs have not shown a hardship because, "by filing their lawsuit in state court, [they] avoided the University's appellate process[, and thus,] any injury [they] may have suffered from the process was prevented." Defs.' Mot. at 8.

The Court finds it beyond dispute that Plaintiffs never completed the University's disciplinary process, and permanently avoided any adverse consequences therefrom, because it was halted by the permanent state court injunction that they sought. *See Hole*, 194 S. W. 3d at 593 ("[t]he final judgment, among other things, permanently enjoined TAMU from enforcing the sanctions previously assessed"); *see also Bryan G. Hole, et. al. v. Texas A&M University*, Cause No. 03-00858-CV-272, 272nd District Court, Brazos County, Texas, Final Judgment at 8-9. Thus, Plaintiffs did not suffer from any legal harm characteristic of school disciplinary proceedings, such as suspension, expulsion, or even a notation of discipline on Plaintiffs transcripts. In an effort to overcome this apparent flaw in their standing, Plaintiffs claim their "injury-in-fact" for purposes of this federal case *is* the "extraordinary legal fees and expenses incurred [in state court] as a result of Defendants' constitutional deprivations." Pls.' Resp. at 5. The question then is whether legal costs alone (from underlying litigation in which Plaintiffs ultimately did not prevail) can establish a "hardship" for purposes of conferring Article III standing. *See Cent. & Sw. Servs.*, 220 F.3d at 690.

The Supreme Court has held that a plaintiff cannot achieve standing to litigate a substantive issue (i.e., constitutional due process deprivations during disciplinary proceedings) by bringing a suit for the

costs of bringing suit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[a]n interest in attorneys' fees . . . is insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim"). In order for there to be a redressable injury-in-fact, "the litigation must give plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself." *Id.; see also Lopez v. Houston Indep. Sch. Dist.*, 124 Fed. Appx. 234 (5th Cir. 2005).

In *Lopez*, an attorney who represented a client in a dispute with her employer, the Houston Independent School District ("HISD"), sought and failed, without resorting to litigation, to recover attorneys' fees pursuant to the Americans with Disabilities Act ("ADA") from HISD after successfully mediating his client's case. *See Lopez*, 124 Fed. Appx. at 235. The attorney then filed suit in district court seeking attorneys' fees relating to his prior representation of the HISD employee. *See id.* The Fifth Circuit upheld the district court's opinion that the attorney lacked standing to sue solely for attorneys' fees given that the relevant provision of the ADA permits only a "prevailing party" to secure attorneys' fees. *See id.* at 236. Specifically, the Fifth Circuit held that the attorney lacked the "requisite 'personal injury' to have standing in federal court." *See id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

In this case, a favorable judgment in Plaintiffs' § 1983 cause of action for compensatory damages would not benefit Plaintiffs beyond reimbursing them for the costs that were a byproduct of the underlying state litigation. *See Steel Co.*, 523 U.S. at 107. Thus, like the Court in *Lopez*, this Court also holds that

while legal fees may be an "actual" injury, given that 42 U.S.C. § 1988 permits only prevailing parties to recover attorneys' fees, Plaintiffs have not established a "personal injury" for purposes of Article III standing in this federal suit. *Lopez*, 124 Fed. Appx. at 236.

Absent an injury-in-fact, Plaintiffs cannot establish that any dispute based on the deficiencies of the University's disciplinary process ever ripened into an actual controversy. Moreover, since Plaintiffs are now graduated with unblemished records,[4] their claims now suffer from a sort of indefinite unripeness. A factual allegation that Plaintiffs *might* re-enroll at TAMU for an advanced degree does not transform their unripe claims into ripe ones. *See Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 606 (5th Cir. 2004) (an injury sufficient to confer standing on a plaintiff must be actual or imminent and not abstract, conjectural, or hypothetical).

Alternatively, assuming Plaintiffs' claims were ripe at the time this federal suit was filed because the state

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[4] The Court's review of Plaintiffs' final school transcripts, attached as a sealed exhibit to Defendants' Motion and stamped and signed by the TAMU Registrar, Donald D. Carter, reveals that the Plaintiffs' transcripts bear no marking of discipline, or any other University violation, and reflect that a Bachelor of Arts Degree was conferred on Plaintiff Hole on August 12, 2005, and that a Bachelor of Science was conferred on Plaintiff Gonzalez on May 13, 2006 (DE 50, Ex. 1-C). A verified affidavit by Donald D. Carter, submitted along with the Plaintiffs' transcripts states that "[t]he records attached hereto are [ ] the exact duplicates of the original" (DE 50, Ex. 1-C); *see also* Pls.' Resp. ¶ 25 (conceding unblemished status of diplomas but claiming risk still exists that University would revoke diplomas if Plaintiffs returned for post-graduate studies).

court case had not yet been reversed on appeal for lack of ripeness, a finding this Court does not make, the combination of Plaintiffs' intervening graduations, the state district court judgment, and the subsequent state Court of Appeals opinion vacating that judgment and dismissing Plaintiffs' suit, renders any present need for declaratory or injunctive relief moot. The remaining claim for legal fees under § 1983 necessarily fails at the pleadings stage since Plaintiffs have not pleaded, and cannot prove, that they were the prevailing party in the underlying state litigation. This defect in Plaintiffs' claim, be it a problem of ripeness or mootness, touches each cause of action they have presented to this Court. Nevertheless, the Court will walk through the effect of Plaintiffs' lack of an injury-in-fact with regard to each cause of action alleged in Plaintiffs' latest amended complaint.

B. First Cause of Action – Injunctive Relief Under 42 U.S.C. § 1983

Plaintiffs seek injunctive relief on the ground that "Defendants, in their official capacities, will continue to violate Plaintiffs' constitutional rights if Defendants are not enjoined by this Court." Pls.' Am. Compl. ¶ 20. Injunctive relief under 42 U.S.C. § 1983 requires ongoing harm, such that the Court's remedy would be *prospective*. *See Verizon Md. Inc. V. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (emphasis added); *see also McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412-14 (5th Cir. 2004) (affirming grant of injunctive relief in suit by 21 mentally disabled persons against three Texas state officers for failure to adequately provide community-based living options since under *Ex parte Young* exception, a 'federal court, consistent with the Eleventh Amendment, may enjoin

state officials to conform their future conduct to the requirements of federal law'). Plaintiffs' graduation, coupled with the fact that they are not now enrolled, or have even sought to re-enroll at the University indicates no ongoing harm, and thus, prevents the Court from providing any *prospective* remedy as to them.

C. Second Cause of Action – Compensatory Damages under 42 U.S.C. § 1983

Plaintiffs also seek compensatory damages against several of the Defendants in their individual capacities for deprivations of Plaintiffs' constitutional right to freedom of speech and assembly, and due process. *See* Pls.' Am. Compl. ¶ 21. Specifically, Plaintiffs seek damages in the amount of the attorneys' fees and expenses that were incurred by Plaintiffs to protect their constitutional rights in the state court proceedings. *See id.* at ¶ 22. The Court first reiterates its above-stated position that a suit solely for attorneys' fees does not meet the Article III minimum requirements for standing. *See Steel Co.*, 523 U.S. at 107 (in order for there to be a redressable injury-in-fact, "the litigation must give plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself').

Even assuming this requirement has been met, case law makes clear that compensatory damages under 42 U.S.C. § 1983, including an award of attorneys fees incurred as a result of underlying state litigation that had as its objective the enforcement of federal constitution rights, requires the plaintiff to show that they were the "prevailing party" in the underlying state action. *See* 42 U.S.C. § 1988; *see also*

Simi Inv. Co. Inc. v. Harris County, Texas, 236 F.3d 240, 255 (5th Cir. 2000) (denying in federal suit plaintiffs legal fees relating to initial suit in state court where that state suit did not allege a Section 1983 violation). To qualify as a "prevailing party," either in an original § 1983 federal suit, or in an underlying state suit that eventually leads to a federal § 1983 suit, as in the instant case, the Fifth Circuit has held that the plaintiff must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendants behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement. *See Walker v. City of Mesquite, Tex.*, 313 F.3d 246, 249 (5th Cir. 2002).

Although Plaintiffs won permanent injunctive relief, a declaratory judgment, and reasonable attorneys fees at the trial court level,[5] Plaintiffs lost

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[5] The portion of the state district court's order awarding attorneys fees to Plaintiff Hole reads as follows:

> It is further ORDERED, ADJUDGED, and DECREED that Plaintiff BRYAN GLEN HOLE recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $232,500, which the court finds to be a reasonable and necessary attorneys' fee for the handling of the declaratory judgment claims up to the entry of this final judgment; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $20,000 which the court finds to be a reasonable and necessary attorneys' fee for handling the case on appeal, to include preparing a brief and appearing at oral argument before a Court of Appeals; that he recover of and from Defendant TEXAS A&M the amount of $4,000 which the court finds to be a reasonable and necessary attorneys' fee for responding to

their state court case on appeal for lack of subject matter jurisdiction because Plaintiffs had never completed the TAMU disciplinary proceedings, they had no concrete injury and thus, the case was not ripe for adjudication. *See Hole,* 194 S. W.3d at 593. Thus, Plaintiffs do not have an enforceable judgment which shows that Defendants are liable for constitutional violations actionable under 42 U.S.C. § 1983. *Compare Simi Inv. Co. Inc.,* 236 F.3d at 255 (denying in federal suit a plaintiffs legal fees from underlying state suit) *with Castellano v. Fragozo,* 311 F.3d 689 (5th Cir. 2002) (awarding plaintiff attorneys' fees in federal

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> a petition for review; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $7,000 which the court finds to be a reasonable and necessary attorneys' fee for filing a brief in the event the Texas Supreme Court grants a petition for discretionary review; and that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $4,000 which the court finds to be a reasonable and necessary attorneys' fee for arguing the case before the Texas Supreme Court should a request for oral argument be granted. The total award of attorney fees that BRYAN GLEN HOLE shall recover from TEXAS A&M UNIVERSITY is $267,500. . . .

Bryan G. Hole, et. al. v. Texas A&M University, Cause No. 03-00858-CV-272, 272nd District Court, Brazos County, Texas, Final Judgment at 13-14. The portion of the state district court's order awarding attorneys fees to Plaintiff Gonzalez reads substantially the same, except that the award for handling the declaratory judgment claim was $57,600; the award for appal $2,500; for responding to a petition for review $5,000; for arguing the case before the Supreme Court of Texas if necessary $4,000, for a total of $77,600. *See id* at 16. Plaintiff Gonzalez' award of attorneys' fees was to be shared jointly with another Plaintiff to the state court action, Michael Fox. *See id.* This judgment was also reversed and dismissed by the Texas Court of Appeals. *See Hole,* 194 S.W.3d at 593.

Section 1983 suit relating to underlying state criminal action where expenditure was a foreseeable result of defendants' malicious prosecution for arson). Therefore, Plaintiffs were not the "prevailing party" in their underlying state case, and consequently, cannot now seek the attorneys fees they were denied there in the form of § 1983 damages in this federal suit.

The Court also finds that Plaintiffs' suit is not one that falls under the "capable of repetition yet evading review" exception to the mootness doctrine. That doctrine applies when (1) the duration of the challenged action is too short to be litigated prior to cessation, and (2) there is a "reasonable expectation that the *same part[ies]* will be subjected to the *same [offending] action* again." *Spencer v. Kemna,* 523 U.S. 1, 17-18 (1998) (emphasis added); *see also Walsh v. Louisiana High Sch. Athletic Ass'n,* 616 F.2d 152 (5th Cir. 1980) (finding that district court below reasonably could expect that the same complaining parties again would be subjected to the challenged action in the future). Since Plaintiffs have graduated, and have not pleaded that they are now re-enrolled in, have been accepted to any post-graduate program at TAMU, or have even applied to TAMU, the Court holds that there is no "reasonable expectation" that they will be subjected to the University's allegedly constitutionally defective disciplinary proceedings. *Id.*

D. Third Cause of Action – Declaratory Relief Under 28 U.S.C. § 2201

Plaintiffs assert that without a declaratory judgment as to the constitutionality of TAMU's Student Conduct Code, they will continue to have "substantial doubts and uncertainties as to their rights

and legal relations with TAMU." Pls.' Am. Compl. ¶ 23. The Declaratory Judgments Act provides that:

> [i]n a case of *actual controversy* within its jurisdiction, . . .any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a) (emphasis added). Plaintiffs graduated from TAMU. They are not currently enrolled in, nor have they applied to or been accepted to any post-graduate degree program at TAMU. They have alleged no more than a "plan" to attain post-graduate degrees at TAMU. Pls.' Resp. ¶ 24. That is not sufficient to create an "actual controversy." 28 U.S.C. § 2201 (a); *see also Johnson v. Kansas City S. Ry. Co.*, 2006 WL 3371772, at *4 (5th Cir. Nov. 21, 2006) (Section 2201 'case of actual controversy' requirement is coterminous with Article III's 'case or controversy' requirement).

VI. CONCLUSION

Though TAMU's conduct in 2002 and 2003 in bringing disciplinary proceedings against Plaintiffs might have presented a case or controversy, Plaintiffs have not alleged any injury-in-fact redressable by this Court ever resulted from those allegedly flawed proceedings. This fact deprives Plaintiffs of the requisite standing to seek relief in federal court. There is not a ripe case or controversy properly before this Court. If and when Plaintiffs return, or perhaps even attempt to return to TAMU, and are somehow affected

by the events that occurred during October 2002 while they were students of TAMU and members of the PMC, a justiciable case or controversy might exist. Until such time, the Court hereby GRANTS Defendants' Rule 12(c) Motion and dismisses this case. All other pending motions, including Plaintiffs' Unopposed Motion for Entry of an Order to Utilize Discovery (DE 61), are hereby dismissed as moot.

In light of the Plaintiffs having lost their state court case on appeal, and in light of this Court's Order granting Defendants' Motion, Plaintiffs do not qualify as "prevailing parties." Accordingly, the Court hereby DENIES Plaintiffs' request for reasonable attorneys' fees, costs of court, and pre and post-judgment interest in this action.

SIGNED this 10th day of February, 2009.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge

APPENDIX C

42 U.S.C.A. § 1983
Effective: October 19, 1996

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Current through P.L. 111-144 approved 3-2-10

APPENDIX D

IN THE DISTRICT COURT
272nd JUDICIAL DISTRICT
BRAZOS COUNTY, TEXAS

CAUSE NO. 03-00858-CV-272

[Filed August 13, 2004]

BRYAN GLEN HOLE, BRYAN ROBERT HIGGINS, JOHN MAGRUDER, KRISTOPHER J. OGORCHOCK, DANIEL R. DELA VINA, DRAKE D. PROWSE, *et. al.*, Plaintiffs	)
VS.	)
TEXAS A & M UNIVERSITY, Defendant	)

FINAL JUDGMENT WITH FINDINGS OF FACT & CONCLUSIONS OF LAW

BE IT REMEMBERED that on November 4, 2003 came on to be heard the above entitled and numbered cause wherein BRYAN GLEN HOLE, BRYAN ROBERT HIGGINS, JOHN MAGRUDER, KRISTOPHER J. OGORCHOCK, DANIEL R. DELA VINA, DRAKE D. PROWSE, WILL WARDEN, JARED JENKINS, HERIBERTO VEYRAN, CESAR

YARRITU, JOSHUA LAUGHLIN, JACOB E. GRACIA, ROBERT O. CROW, JR., JASON BELL, MICHAEL A. GARZA, E. LLOYD WILLIS, NATHAN BLACKWELDER, ADAM BLACKWELDER, DOMINIC BRAUS, ROYCE NORMAN, ERIC GONZALEZ, MICHAEL FOX and BARRETT BREEDLOVE were the Plaintiffs, and TEXAS A & M UNIVERSITY (hereinafter sometimes referred to as "Texas A&M") was the Defendant. Plaintiffs appeared in person and by their attorneys of record, Tom Matlock, Brandon Baade, Ronald G. Hole and Micaela Alvarez, and announced ready for trial. Defendant Texas A & M University appeared by its attorneys of record, Russ Harris, Natalie Gray, David Morales and Jerry Brown, and also announced ready for trial. On September 22, 2003, the Court had previously entered an order consolidating three other cases, Cause Nos. 03-000860-CV-272, 03-000861-CV-272 and 03-000862-CV-272, into this case, and all matters were tried concurrently.

On November 4, 2003, the consolidated case was called for trial. All parties having announced ready and a jury trial having been timely demanded, twelve good and lawful jurors were selected, sworn and impaneled. After opening statements by plaintiffs and defendant, plaintiffs presented their evidence. After the evidence began, but before the plaintiffs' evidence was concluded, all parties agreed to discharge the jury and submit all matters in controversy, both legal and factual, to the court for its determination.

Thereafter, plaintiffs presented the remainder of their evidence and rested their case. Defendant then presented its evidence and rested. All parties then closed. After the conclusion of all evidence the court

heard the arguments of counsel and on February 23, 2004 issued its preliminary letter ruling as to the constitutional issues in this case. On or about May 21, 2004, the court heard additional arguments and requested additional briefing on certain issues. The court makes Findings of Fact and Conclusions of Law (for the sake of convenience, the Conclusions of Law are listed first) as set forth herein:

CONCLUSIONS OF LAW

A1) Due course of law rights under the Texas Constitution in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.

A2) While school officials must be given considerable freedom to achieve effective school administration, courts should not hesitate to act when fundamental constitutional liberties are contravened.

A3) Sovereign immunity does not prevent the assertion of a claim alleging that the state deprived the plaintiff of property or liberty without due course of law.

A4) An undergraduate student has a constitutionally protected liberty interest in his undergraduate education that must be afforded procedural due process.

A5) A person seeking judicial review of an adverse governmental or quasi-governmental decision affecting protected liberty or property interests is deprived of due course of law if the governmental body fails to produce any record for meaningful review.

A6) When a public school or state university takes disciplinary action against a student which, for any substantial length of time, deprives the student of the opportunity to continue his or her education, the school must afford the student due course of law.

A7) Due course of law in school administrative disciplinary proceedings against a student entitles the student to a statement of the charges against them, the names of witnesses and the nature of the testimony of those witnesses and an opportunity of presenting a defense.

A8) A person cannot be deprived of a liberty interest without due course of law even if the liberty interest is a statutory creation of the State or a regulatory creation of a state supported university.

A9) Due course of law guarantees that, during a disciplinary hearing, a student is entitled to have a lawyer of his own choice to consult with and advise him without participating further when the subject matter of the disciplinary hearing could also be the basis of criminal prosecution.

A10) Due course of law does not require that student disciplinary hearings take the form of full-dress judicial hearings, nor does it require that a student be able to cross examine witnesses.

A11) For a state supported university to compel a student to give evidence against himself violates due course of law.

A12) Where a university procures evidence against a student in a manner that clearly and unmistakably

violates due course of law, the exclusionary rule prevents the university from using the evidence against him in a disciplinary hearing.

A13) Due course of law requires that when a university official is considering evidence against a student in a disciplinary hearing, the evidence must be disclosed to the student so that he has an opportunity to show that it is untrue.

A14) For a university to use evidence procured in one student disciplinary hearing against another student in a second disciplinary hearing without informing the latter student violates due course of law.

A15) Due course of law requires a neutral and detached hearing officer and impartial trier of fact in any student disciplinary hearing where suspension or expulsion may be a consequence.

A16) For a state supported university to punish a student for conduct that was not proscribed at the time it was done violates due course of law.

A17) Due course of law requires that, before disciplining a student, a university must establish personal guilt or responsibility; for it to punish for 'guilt by association' violates due course of law.

A18) A justiciable controversy need not be a fully ripened cause of action in order for a plaintiff to file for relief provided that certain circumstances exist.

A19) The Texas Declaratory Judgment Act waives the state's sovereign immunity in a proper case and

provides that a trial court may, in its discretion, award attorney's fees to the prevailing party.

FINDINGS OF FACT

B1) Pursuant to the stipulation of the parties, the court treats the testimony of the nine testifying plaintiffs as representative of all 23 plaintiffs.

B2) Texas A&M hindered the plaintiffs' right to consult with counsel during and prior to the plaintiffs' student disciplinary hearings.

B3) Texas A&M coerced self-incriminating statements from the plaintiffs.

B4) Texas A&M hearing officers considered secret evidence against the plaintiffs in the disciplinary hearings.

B5) Texas A&M's hearing officers were not neutral and detached and were not impartial triers of fact.

B6) Texas A&M placed the plaintiffs under a 'gag' order that was never lifted, precluding them from talking about the allegations or the related facts.

B7) Texas A&M failed to provide plaintiffs with notice of specific conduct that was considered violative of university rules; it failed to provide them with names of witnesses testifying against them; and failed to provide them with the substance of the witnesses' testimony.

B8) Texas A&M attempted to discipline plaintiffs for conduct that occurred long before the fall 2002 semester.

B9) Texas A&M attempted to discipline plaintiffs for past conduct when the conduct was not proscribed at the time it occurred.

B10) Texas A&M disciplined or attempted to discipline plaintiffs without substantial evidence to support its decision.

B11) Texas A&M disciplined or attempted to discipline plaintiffs based on 'guilt by association' without a showing of personal guilt as to each plaintiff.

B12) The facts of this case manifested the ripening seeds of a controversy even though the differences between some of the plaintiffs and Texas A&M as to their legal rights had not reached the state of an actual controversy (ie. for some of the plaintiffs, disciplinary hearings had not yet occurred).

B13) Throughout the course of this litigation, Texas A&M has steadfastly maintained that its manner of applying Student Conduct Code Rules 24.3.1 *False Information* and 24.3.15 *Failure to Comply with Directions* and its manner of applying *Rights in Student Conduct Proceedings* Rules numbered 26.1.1, 26.1.3, 26.1.7 and 26.3 was the proper manner to apply said student rules. Thus, by its own admission, Texas A&M intends to always apply the same said student conduct disciplinary procedural rules as it applied them to these plaintiffs (this necessitates the court's consideration of the constitutionality of said rules ***as***

applied to the plaintiffs even if the rules appear facially valid under the constitution).

After considering all of the credible evidence, the pleadings, the briefs, the arguments of counsel and after conducting its own research, the court is of the opinion that certain orders should be made in this case.

Pursuant to the Texas Declaratory Judgment Act, the court declares that:

C1) By hindering the plaintiffs' right to counsel (more specifically, consultation) when they were subject to criminal prosecution for the same conduct that was the subject of the disciplinary proceedings, Texas A&M deprived plaintiffs of due course of law under the Texas Constitution;

C2) By compelling the plaintiffs to provide incriminating evidence against themselves and by punishing the plaintiffs for refusing to do so, Texas A&M deprived plaintiffs of due course of law under the Texas Constitution;

C3) When its hearing officers considered secret evidence in student disciplinary hearings, Texas A&M deprived plaintiffs of due course of law under the Texas Constitution;

C4) By utilizing hearing officers that were not neutral and detached in disciplinary hearings where lengthy suspensions were contemplated, and, in some instances, even planned beforehand, Texas A&M deprived plaintiffs of due course of law under the Texas Constitution;

C5) By imposing a 'gag' order on the plaintiffs regarding the very investigation of which they were a target, Texas A&M deprived plaintiffs of due course of law under the Texas Constitution;

C6) By depriving the plaintiffs notice of the specific conduct that it considered violative of university rules, by depriving them of the specific names of the witnesses that were providing evidence against them, and by depriving them of the substance of the said witnesses testimony, Texas A&M deprived plaintiffs of due course of law under the Texas Constitution;

C7) By sanctioning plaintiffs without establishing personal guilt (ie. by relying on 'guilt by association'), Texas A&M deprived plaintiffs of due course of law under the Texas Constitution; and

C8) By sanctioning some of the plaintiffs for conduct which was not proscribed at the time that it was allegedly perpetrated (ie. ex post facto), Texas A&M deprived plaintiffs of due course of law under the Texas Constitution;

C9) While facially valid, Texas A&M's Student Conduct Code Rules 24.3.1 *False Information* and 24.3.15 *Failure to Comply with Directions* are unconstitutional under the Texas Constitution ***as applied*** to the plaintiffs;

C10) While facially valid, Texas A&M's manner of application of its own *Rights in Student Conduct Proceedings* Rules numbered 26.1.1, 26.1.3, 26.1.7 and 26.3 renders the same said rules unconstitutional under the Texas Constitution ***as applied*** to the plaintiffs.

Accordingly, in light of all of credible evidence, the law and the court's rulings pursuant to the Texas Declaratory Judgment Act, it is hereby

ORDERED, ADJUDGED and DECREED that defendant TEXAS A&M UNIVERSITY is permanently enjoined from enforcing the sanctions previously assessed against plaintiffs during the Spring 2003 semester (any sanctions assessed will have to be the result of a new hearing). It is further

ORDERED, ADJUDGED and DECREED that defendant TEXAS A&M UNIVERSITY is permanently enjoined from using, on any rehearing, the self-incriminating statements made by the plaintiffs during the investigative process and previous hearing process. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY is permanently enjoined from disciplining plaintiffs for not giving self incriminating statements or for otherwise not participating in the investigations. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY is permanently enjoined from disciplining any of the plaintiffs for violating the 'gag' order in place during defendant's initial investigation. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY is permanently enjoined from interfering, on any rehearing, with any plaintiffs effort to consult with an attorney of his choice. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY is permanently enjoined from disciplining plaintiffs for alleged misconduct that occurred prior to October 2002. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY is permanently enjoined from disciplining plaintiffs under any University or Standard rules, other than rules as they existed and were in effect at the time of the alleged misconduct. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY is permanently enjoined from disciplining plaintiffs for hazing when a plaintiff himself reported the hazing to a university official. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY is permanently enjoined from disciplining plaintiffs under Student Conduct Code 24.3.14 *False Information* and 24.3.15 *Failure to Comply with Directions* in connection with the plaintiffs' refusal to provide self-incriminating information. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, is required to provide each plaintiff with notice of the specific charges against him, which includes a reasonable approximate description of the date, place and manner he is alleged to have violated the hazing statute or rule

against underage drinking or any other alleged rule violation. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, is required to provide each plaintiff with the names of the witness(es) against him and a summary of each proposed witness' testimony and note whether the witnesses' statements will be considered in writing or in the form of live testimony. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, is required to provide each plaintiff such notices at least seven days prior to the hearing, and provide each plaintiff a meaningful opportunity to review all the evidence that will be considered by the hearing officers. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, is required to make a record of each proceeding, which should be, at a minimum, an audio recording of the proceedings. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, may allow the hearing officers to review the evidence collected before the hearing, provided that they do individually, not in

concert with any other hearing officer, and so long as the hearing officers do not discuss the evidence with each other or any other person, to include any other case presenter, prior to hearing itself. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, the persons selected to serve as hearing officers and case presenters should be men and women with reputations for fairness and integrity, and such persons should not have already formed a firm opinion as to whether the misconduct did or did not occur, or what sanction, if any, should be applied to any particular student. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, in order to assure the appearance of fairness and propriety as well as fairness in fact, shall select persons who have had no previous involvement in these disciplinary proceedings. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, may conduct the hearings jointly. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, is required to

either select new hearing officers for each hearing or, if Defendant prefers to use the same hearing officers, in order to ensure fairness to each student after the first student hearing, Texas A&M is ORDERED to provide to each plaintiff with at least an audio recording of what transpired at all of the previous hearings concerning plaintiffs that such hearing officers previously conducted. It is further

ORDERED, ADJUDGED and DECREED that Defendant TEXAS A&M UNIVERSITY, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, shall ask General Van Alstyne to identify one military officer, and shall ask Dr. Robert Gates or the faculty senate to identify two non-military people to comprise a panel of three hearing officers, without attempting to influence any of the selected hearing officers beforehand. It is further

ORDERED, ADJUDGED and DECREED that Defendant Texas A&M University, in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, shall ask Dr. Dave Parrott or his replacement to identify one or two 'case presenters' to collect the evidence and present it to the panel at the hearing. It is further

ORDERED, ADJUDGED and DECREED that in conducting rehearings in the disciplinary proceedings against the plaintiffs for their alleged misconduct, if any of the selecting parties are unwilling to act and to identify hearing officers or case presenters as the case may be, the court will endeavor to select university personnel to conduct the rehearings, and TEXAS A&M

UNIVERSITY, through its attorneys should apprise the court if it is necessary to so act. It is further

ORDERED, ADJUDGED and DECREED that, as equitable relief granted, Plaintiff BRYAN GLEN HOLE receive a grade of "no-grade" for Statistics 211 for the Spring 2002 semester. It is further

ORDERED, ADJUDGED and DECREED that, as equitable relief granted, Plaintiff MICHAEL GARZA receive grades of "no-grade" for all the courses in which he received a failing grade for the Spring 2003 semester. It is further

ORDERED, ADJUDGED and DECREED that Plaintiff BRYAN GLEN HOLE recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $232,500, which the court finds to be a reasonable and necessary attorneys' fee for the handling of the declaratory judgment claims up to the entry of this final judgment; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $20,000 which the court finds to be a reasonable and necessary attorneys' fee for handling the case on appeal, to include preparing a brief and appearing at oral argument before a Court of Appeals; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $4,000 which the court finds to be a reasonable and necessary attorneys' fee for responding to a petition for review; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $7,000 which the court finds to be a reasonable and necessary attorneys' fee for filing a brief in the event the Texas Supreme Court grants a petition for discretionary review; and that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of

$4,000 which the court finds to be a reasonable and necessary attorneys' fee for arguing the case before the Texas Supreme Court should a request for oral argument be granted. The total award of attorney fees that BRYAN GLEN HOLE shall recover from TEXAS A&M UNIVERSITY is $267,500.

However, as to the total attorneys' fee awarded to BRYAN GLEN HOLE, TEXAS A&M UNIVERSITY shall be entitled to a remittitur of $4,000 if petition for review is granted by and a brief is filed with the Texas Supreme Court, but oral argument is not granted; TEXAS A&M UNIVERSITY shall be entitled to an additional remittitur of $7,000 if petition for review is granted, but no brief is filed with and oral argument is not granted by the Texas Supreme Court; TEXAS A&M UNIVERSITY shall be entitled to an additional remittitur of $4,000 if petition for review is filed, but no response is filed with, no brief is filed with and oral argument is not granted by the Texas Supreme Court; and, finally, TEXAS A&M UNIVERSITY shall be entitled to an additional remittitur of $20,000 if no notice of appeal is filed at all. It is further

ORDERED, ADJUDGED and DECREED that Plaintiff BARRETT BREEDLOVE recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $51,746, which the court finds to be a reasonable and necessary attorneys' fee for the handling of the declaratory judgment claims up to the entry of this final judgment; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $10,000 which the court finds to be a reasonable and necessary attorneys' fee for handling the case on appeal, to include preparing a brief and appearing at oral argument before a Court of Appeals; that he recover of

and from Defendant TEXAS A&M UNIVERSITY the amount of $2,500 which the court finds to be a reasonable and necessary attorneys' fee for responding to a petition for review; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $5,000 which the court finds to be a reasonable and necessary attorneys' fee for filing a brief in the event the Texas Supreme Court grants a petition for discretionary review; and that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $2,500 which the court finds to be a reasonable and necessary attorneys' fee for arguing the case before the Texas Supreme Court should a request for oral argument be granted. The total award of attorney fees that BARRETT BREEDLOVE shall recover from TEXAS A&M UNIVERSITY is $71,746.

However, as to the total attorneys' fee awarded to BARRETT BREEDLOVE, TEXAS A&M UNIVERSITY shall be entitled to a remittitur of $2,500 if petition for review is granted by and a brief is filed with the Texas Supreme Court, but oral argument is not granted; TEXAS A&M UNIVERSITY shall be entitled to an additional remittitur of $5,000 if petition for review is granted, but no brief is filed with and oral argument is not granted by the Texas Supreme Court; TEXAS A&M UNIVERSITY shall be entitled to an additional remittitur of $2,500 if petition for review is filed, but no response is filed with, no brief is filed with and oral argument is not granted by the Texas Supreme Court; and, finally, TEXAS A&M UNIVERSITY shall be entitled to an additional remittitur of $10,000 if no notice of appeal is filed at all by BARRETT BREEDLOVE. It is further

ORDERED, ADJUDGED and DECREED that Plaintiff ERIC GONZALES and MICHAEL FOX (jointly) recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $57,600 which the court finds to be a reasonable and necessary attorneys' fee for the handling of the declaratory judgment claims up to the entry of this final judgment; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $2,500 which the court finds to be a reasonable and necessary attorneys' fee for handling the case on appeal, to include preparing a brief and appearing at oral argument before a Court of Appeals; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $5,000 which the court finds to be a reasonable and necessary attorneys' fee for responding to a petition for review; that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $2,500 which the court finds to be a reasonable and necessary attorneys' fee for filing a brief in the event the Texas Supreme Court grants a petition for discretionary review; and that he recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $4,000 which the court finds to be a reasonable and necessary attorneys' fee for arguing the case before the Texas Supreme Court should a request for oral argument be granted. The total award of attorney fees that ERIC GONZALES and MICHAEL FOX (jointly) shall recover from TEXAS A&M UNIVERSITY is $77,600.

However, as to the total attorneys' fee awarded to ERIC GONZALES and MICHAEL FOX (jointly), TEXAS A&M UNIVERSITY shall be entitled to a remittitur of $2,500 if petition for review is granted by and a brief is filed with the Texas Supreme Court, but oral argument is not granted; TEXAS A&M

UNIVERSITY shall be entitled to an additional remittitur of $5,000 if petition for review is granted, but no brief is filed with and oral argument is not granted by the Texas Supreme Court; TEXAS A&M UNIVERSITY shall be entitled to an additional remittitur of $2,500 if petition for review is filed, but no response is filed with, no brief is filed with and oral argument is not granted by the Texas Supreme Court; and, finally, TEXAS A&M UNIVERSITY shall be entitled to an additional remittitur of $10,000 if no notice of appeal is filed at all by ERIC GONZALES and MICHAEL FOX. It is further

ORDERED, ADJUDGED and DECREED that Plaintiff JOHN MAGRUDER recover of and from Defendant TEXAS A&M UNIVERSITY the amount of $7,500, which the Court finds to be a reasonable and necessary attorneys' fee for the handling of the declaratory matter up to the entry of this final judgment; no attorney fees awarded to JOHN MAGRUDER for appellate purposes as the court heard no testimony regarding the same. The total award of attorney fees that JOHN MAGRUDER shall recover from TEXAS A&M UNIVERSITY is $7,500. It is further

ORDERED, ADJUDGED and DECREED that if one lawyer or law firm defends on appeal this judgment for the benefit of all plaintiffs, then TEXAS A&M UNIVERSITY will be entitled to remittitur of all appellate attorney fees awarded to BARRETT BREEDLOVE, ERIC GONZALES and JOHN FOX. It is further

ORDERED, ADJUDGED and DECREED that all costs herein are assessed against Defendant. It is further

ORDERED, ADJUDGED and DECREED that TEXAS A&M UNIVERSITY shall, in a conspicuous manner and in a manner reasonably calculated to make the documents accessible by current students, post on its Department of Student Life website both a copy of the court's preliminary February 23, 2004 letter ruling a copy of the final letter ruling entered today's date. TEXAS A&M UNIVERSITY shall keep the two said letters posted for a period of two years from the date that this judgment becomes final for all purposes.

All writs and processes for the enforcement and collection of the costs of court may issue as necessary.

All other relief not expressly granted herein is DENIED.

SIGNED this **13th** day of **August** 2004.

/s/ Rick Davis
Rick Davis
Presiding Judge
Judge Presiding, 272nd District Court

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Mr. Jerry M. Brown
The Texas A&M Unive

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CIVIL ACTION NO. B-04-175
JURY DEMANDED

[Filed July 25, 2007]

BRYAN G. HOLE and ERIC E. GONZALEZ	)
	)
Plaintiffs,	)
	)
v.	)
	)
TEXAS A&M UNIVERSITY; ROBERT GATES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; DAVID PARROT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; MICHAEL COLLINS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; LAURA SOSH-LIGHTSY, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; and JACQUIE VARGAS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY	)
	)
Defendants	)

PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Plaintiffs BRYAN G. HOLE and ERIC E. GONZALEZ, hereinafter at times referred to collectively as "Plaintiffs," complaining of Defendants TEXAS A&M UNIVERSITY, ROBERT GATES, DAVID PARROT, MICHAEL COLLINS, LAURA SOSH-LIGHTSY and JACQUIE VARGAS, hereinafter at times referred to collectively as "Defendants," in their individual and official capacities, and for such complaint would allege as follows:

I.

JURISDICTION AND VENUE

1. This Court has jurisdiction of the claims asserted herein pursuant to 28 U.S.C. §1331, 28 U.S.C. §2201 and pursuant to 42 U.S.C. §1983. Venue of this civil action is proper in the Southern District of Texas pursuant to 28 U.S.C. §1391(b).

II.

PARTIES

Plaintiffs

2. Plaintiff Bryan G. Hole, hereinafter at times referred to as "Plaintiff Hole," is a natural person who

is a resident of the Southern District of Texas and was during all relevant periods of time, a student at Texas A & M University.

3. Plaintiff Eric E. Gonzalez, hereinafter at times referred to as "Plaintiff Gonzalez," is a natural person who is a resident of the Southern District of Texas and was, during all relevant periods of time, a student at Texas A & M University.

Defendants

4. Defendant Texas A&M University, hereinafter at times referred to as "Defendant TAMU," filed its original answer on or about October 27, 2004 and is before this honorable Court for all purposes.

5. Defendant Robert Gates, hereinafter at times referred to as "Defendant Gates," filed his original answer on or about October 27, 2004 and is before this honorable Court for all purposes.

6. Defendant David Parrot, hereinafter at times referred to as "Defendant Parrot," filed his original answer on or about October 27, 2004 and is before this honorable Court for all purposes.

7. Defendant Michael Collins, hereinafter at times referred to as "Defendant Collins," filed his original answer on or about October 27, 2004 and is before this honorable Court for all purposes.

8. Defendant Laura Sosh-Lightsy, hereinafter at times referred to as "Defendant Lightsy," filed her original answer on or about October 27, 2004 and is before this honorable Court for all purposes.

9. Defendant Jacquie Vargas, hereinafter at times referred to as "Defendant Vargas," filed her original answer on or about October 27, 2004 and is before this honorable Court for all purposes.

III.

FACTUAL BACKGROUND

10. Plaintiffs were, at all relevant time periods, students in good standing at Texas A & M University, a state-funded university. Plaintiffs have liberty interests in their reputations, their good names and their secondary education. Such liberty interests are protected and guaranteed to Plaintiffs by the Fourteenth Amendment to the United States Constitution.

11. Plaintiffs also have property interests in the contractual relationships they have with Texas A&M University to provide them with a quality education and to provide them with certain procedural and substantive due process rights in the event of any disciplinary proceedings, in return for the payment of tuition, fees and costs. Such property interests are protected and guaranteed to Plaintiffs by the Fourteenth Amendment to the United States Constitution.

12. During the Fall 2002 semester at Texas A&M University, and thereafter, Defendant Gates, in his individual and/or official capacities, initiated, conducted and/or directly oversaw an investigation and student disciplinary process into hazing within the Parsons' Mounted Cavalry ("PMC"), a student organization at Texas A&M University. During such

investigation and disciplinary process, Defendant Gates kept in constant contact with the supervisor of the investigators and, with the full knowledge and participation, violated Plaintiffs' (and other present and former PMC students') rights under the United States Constitution, causing Plaintiffs to suffer damages and also leaving Plaintiffs with doubts and uncertainties as to their rights and legal relations with Texas A&M University under the Student Conduct Code and under the rules and regulations at Texas A&M University. Specifically, Defendant Gates, among other conduct, oversaw the imposition of pre-determined sanctions; collaborated with local law enforcement agencies to ensure severe sanctions were given, even prior to a University investigation; disregarded Plaintiffs' rights to neutral decision-makers by communicating his desire for harsh sanctions to the investigating and hearing officers; allowed and/or directed employees of Texas A&M University to forbid Plaintiffs from talking with other students, their parents and their attorneys concerning the allegations against them; and forbid Plaintiffs from being able to associate and assemble; thereby denying Plaintiffs of clearly established statutory or constitutional rights, of which a reasonable person would have known.

13. During the Fall 2002 semester at Texas A&M University, and thereafter, Defendant Parrot, in his individual and/or official capacities, initiated, conducted and/or directly oversaw an investigation and student disciplinary process into hazing within the PMC. During such investigation and disciplinary process, with the full knowledge and participation of Defendant Parrot, Plaintiffs' (and other present and former PMC students') rights under the United States

Constitution were violated, causing Plaintiffs to suffer damages and also leaving Plaintiffs with doubts and uncertainties as to their rights and legal relations with Texas A&M University under the Student Conduct Code and under the rules and regulations at Texas A&M University. Specifically, Defendant Parrot, among other conduct, violated Plaintiffs' right to freedom of speech and freedom of assembly; oversaw an investigation which prohibited Plaintiffs from discussing the investigation; violated Plaintiffs' constitutionally protected right to due process by charging Plaintiffs with violations of rules that were not in existence at the time of the alleged improper conduct; collaborated with Defendants Gates, Collins, Lightsy, and other members of Defendant Texas A&M University to pre-determine a general range of sanctions, including severe expulsion from the University, prior to the conclusion of the investigation; oversaw Texas A&M University's disciplinary process which failed to afford Plaintiffs the opportunity to review the evidence against them and failed to advise Plaintiffs of the charges against them; failed to provide Plaintiffs with the opportunity of the assistance of counsel; denied Plaintiffs their constitutional right to remain silent; and provided an inappropriate hearing process which failed to comport with the standards set forth by the United States Supreme Court. Each and every act violated Plaintiffs' clearly established statutory or constitutional rights, of which a reasonable person would have known.

14. During the Fall 2002 semester at Texas A&M University, and thereafter, Defendant Collins, in his individual and/or official capacities, initiated, conducted and/or directly oversaw an investigation and student disciplinary process into hazing within the

PMC. During such investigation and disciplinary process, with the full knowledge and participation of Defendant Collins, Plaintiffs' (and other present and former PMC students') rights under the United States Constitution were violated, causing Plaintiffs to suffer damages and also leaving Plaintiffs with doubts and uncertainties as to their rights and legal relations with Texas A&M University under the Student Conduct Code and under the rules and regulations at Texas A&M University. Specifically, among other conduct, Defendant Collins violated Plaintiffs' right to freedom of speech and freedom of assembly; oversaw and participated in an investigation which prohibited Plaintiffs from discussing the investigation process with anyone, including their parents; charged Plaintiffs with violations of rules that were not in existence at the time of the alleged improper conduct; collaborated with Defendants Gates, Parrot, Lightsy, and other members of Defendant Texas A&M University to pre-determine a general range of sanctions, including severe expulsion from the University, prior to the conclusion of the investigation; participated in both the investigation process as well as the hearing/sanctioning phase of the disciplinary process, thereby extinguishing Plaintiffs' rights to a neutral hearing officer; participated in Defendant's disciplinary process which failed to afford Plaintiffs the opportunity to review the evidence against them; failed to advise Plaintiffs of the charges against them; failed to provide Plaintiffs with the opportunity of the assistance of counsel; denied Plaintiffs their constitutional right to remain silent; and directly participated in a hearing process which failed to comport with the well established due process standards set forth by the United States Supreme Court. Each and every act violated Plaintiffs' clearly

established statutory or constitutional rights, of which a reasonable person would have known.

15. During the Fall 2002 semester at Texas A&M University, and thereafter, Defendant Lightsy, in her individual and/or official capacities, initiated, conducted and/or directly oversaw an investigation and student disciplinary process into hazing within the PMC. During such investigation and disciplinary process, with the full knowledge and participation of Defendant Lightsy, Plaintiffs' (and other present and former PMC students') rights under the United States Constitution were violated, causing Plaintiffs to suffer damages and also leaving Plaintiffs with doubts and uncertainties as to their rights and legal relations with Texas A&M University under the Student Conduct Code and under the rules and regulations at Texas A&M University. Specifically, among other conduct, Defendant Lightsy violated Plaintiffs' due process rights; charged Plaintiffs with violations of rules that were not in existence at the time of the alleged improper conduct; collaborated with Defendants Gates, Collins, Parrot, and other members of Defendant Texas A&M University to pre-determine a general range of sanctions, including severe expulsion from the University, prior to the conclusion of the investigation; participated in both the investigation process as well as the hearing/sanctioning phase of the disciplinary process, thereby extinguishing Plaintiffs' rights to a neutral hearing officer; participated in Defendant's disciplinary process which failed to afford Plaintiffs the opportunity to review the evidence against them, failed to advise Plaintiffs of the charges against them; failed to provide Plaintiffs with the opportunity of the assistance of counsel; denied Plaintiffs their constitutional right to remain silent; and directly

participated in a hearing process which failed to comport with the well established due process standards set forth by the United States Supreme Court. Each and every act violated Plaintiffs' clearly established statutory or constitutional rights, of which a reasonable person would have known.

16. During the Spring 2003 semester at Texas A&M University, Defendant Vargas, in her individual and official capacities, directly participated in student disciplinary proceedings involving Plaintiff Hole and other PMC members concerning hazing within the PMC. During such disciplinary process, with the full knowledge and participation of Defendant Vargas, Plaintiff Hole's (and other present and former PMC students') rights under the United States Constitution were violated, causing Plaintiff Hole to suffer damages and also leaving Plaintiff Hole with doubts and uncertainties as to their rights and legal relations with Texas A&M University under the Student Conduct Code and under the rules and regulations at Texas A&M University. Specifically, Defendant Vargas violated Plaintiff Hole's constitutional due process rights by: failing to inform Plaintiff Hole of the specific charges against him; collaborating with Defendants Collins, Lightsy, and other members of Defendant Texas A&M University to deprive Plaintiff Hole of the opportunity to review the evidence against him; failing to provide Plaintiff Hole with the opportunity of the assistance of counsel; denied Plaintiff Hole his constitutional right to remain silent; and intentionally gave Plaintiff Hole, among other PMC students, misinformation in an attempt to get Plaintiff Hole to waive his right to remain silent. Each and every act violated Plaintiff Hole's clearly

established statutory or constitutional rights, of which a reasonable person would have known.

17. During the Spring 2003 semester at Texas A&M University, Defendants began an organized and concerted effort to rush through some seventy-seven student disciplinary hearings, concerning alleged violations of the Texas A&M Student Conduct Rules. Such hearings were scheduled with very little notice to Plaintiffs. Such proceedings were scheduled during the final weeks of the semester when Plaintiffs were preparing for their finals. Such hearings were conducted in violation of the Texas A&M Student Rules, in violation of Plaintiffs' substantive and procedural due process rights guaranteed them by Texas A&M University Student Rules and in violation of the clearly established due process rights guaranteed to Plaintiffs by the Fourteenth Amendment to the United States Constitution.

18. At all times relevant to the investigation and the Plaintiffs' disciplinary hearings, Defendant Gates, individually and as President of Defendant TAMU, intended to continue with the constitutionally infirm disciplinary proceedings regardless of his actual knowledge that the investigations and hearings were being conducted in violation of clearly established due process rights guaranteed by the Defendant Texas A&M University Student Rules and by the Fourteenth Amendment of the United States Constitution.

19. During the investigation and disciplinary process, Plaintiffs' rights, privileges and/or immunities secured by the Constitution or laws of the United States, were violated by Defendants as follows:

A. Defendants Gates, Parrot, Collins and Lightsy, in their dealings with Plaintiffs, violated Plaintiffs' right to freedom of speech, as guaranteed them by the First Amendment to the United States Constitution by authorizing and/or participating in an investigation which prohibited Plaintiffs from discussing the charges against them with anyone, including each other and the even Plaintiffs' parents;

B. Defendants Gates, Parrot, Collins and Lightsy, in their dealings with Plaintiffs, violated Plaintiffs' right to assemble together for their common good, in a peaceful manner, as allowed by the University Rules and the Constitution of the United States, by specifically prohibiting Plaintiffs from gathering to discuss the investigation and the charges brought against them;

C. Defendants Gates, Parrot, Collins and Lightsy, each in their official capacity, charged Plaintiffs with violations of rules that were not even in existence at the time of the alleged improper conduct;

D. Defendants Gates, Parrot, Collins and Lightsy predetermined the general range of sanctions that Plaintiffs would receive;

E. During the month of April 2003, Plaintiffs were sent letters informing them that they were being charged with

violations of certain University Student Rules. The letters provided Plaintiffs with a list of the purported rule violations. However, such letters were entirely inadequate to advise Plaintiffs as to the specific conduct that was being called into question;

F. Plaintiffs were not given an adequate opportunity to review the evidence against them by the hearing officers, Defendants Collins, Lightsy and Vargas; and their supervisor, Defendant Parrot. Such failures were under the direct supervision and at the discretion of Defendant Gates;

G. Plaintiffs were not given adequate time to prepare a defense by the hearing officers, Defendants Collins, Lightsy and Vargas; and their supervisor, Defendant Parrot. Such failures were under the direct supervision and at the discretion of Defendant Gates;

H. Defendants Gates and Parrot, through their subordinates, Defendants Collins, Lightsy and Vargas did not advise Plaintiffs of the witnesses that would be called against them;

I. Plaintiffs were denied their rights to assistance of counsel by the hearing officers, Defendants Collins, Lightsy and Vargas; and their supervisor, Defendant Parrot. Such failures were under the

direct supervision and at the discretion of Defendant Gates;

J. Plaintiffs were denied access to all the evidence that Defendants were using against them in the disciplinary hearings;

K. Plaintiffs were denied neutral or unbiased fact finders in connection with their disciplinary hearings by the hearing officers, Defendants Collins, Lightsy and Vargas; and their supervisor, Defendant Parrot. Such failures were under the direct supervision and at the discretion of Defendant Gates;

L. Plaintiffs were denied their rights to remain silent by the hearing officers, Defendants Collins, Lightsy and Vargas; and their supervisor, Defendant Parrot. Such failures were under the direct supervision and at the discretion of Defendant Gates;

M. Plaintiffs were limited in the witnesses and evidence that they could utilize at their hearings by the hearing officers, Defendants Collins, Lightsy and Vargas; and their supervisor, Defendant Parrot. Such failures were under the direct supervision and at the discretion of Defendant Gates;

N. Plaintiffs were to be provided only "give and take" hearings, notwithstanding the

fact that expulsion was a possible sanction;

O. Defendants shifted the burden of proof to Plaintiffs in the disciplinary proceedings;

P. Defendants shifted the burden of proof to Plaintiffs in the appellate process;

Q. Defendants did not provide for a meaningful appeal of the hearing officers' determination; and

R. Other specific violations of the Texas A&M University Rules and other violations of clearly established statutory or constitutional rights of which a reasonable person would have known.

IV.

FIRST CAUSE OF ACTION

20. Pursuant to 42 U.S.C. §1983, Plaintiffs hereby sue for injunctive relief. Plaintiffs would show that Defendants, in their official capacities, will continue to violate Plaintiffs' constitutional rights if Defendants are not enjoined by this Court. Accordingly, Plaintiffs hereby request this Court to issue an order to enjoin any ongoing or continuing violations of Plaintiffs' constitutional rights.

V.

SECOND CAUSE OF ACTION

21. Pursuant to 42 U.S.C. §1983, Plaintiffs hereby sue Defendants Gates, Parrot, Collins, Lightsy and Vargas in their individual capacities for compensatory damages. As a result of the conduct of Defendants Gates, Parrot, Collins, Lightsy and Vargas, acting under color of state law, Plaintiffs were deprived of rights, privileges or immunities secured by the Constitution or laws of the United States. Such actions by Defendants, as noted above in paragraph 19A-R, violated clearly established statutory or constitutional rights of which a reasonable person would have known.

22. As a result of Defendants' conduct and actions, Plaintiffs suffered damages. Such damages include the attorneys' fees and expenses that were incurred by Plaintiffs to protect their constitutional rights. Plaintiffs now seek to recover their compensatory damages, for which they hereby sue.

VI.

THIRD CAUSE OF ACTION

23. Pursuant to 28 U.S.C. §2201, Plaintiffs hereby sue for declaratory relief to determine the rights and other legal relations between Plaintiffs and Defendant TAMU. Plaintiffs, as students of Defendant TAMU, have substantial doubts and uncertainties as to their rights and legal relations with Texas A&M University under the Student Conduct Code and under the rules and regulations at Texas A&M University.

24. Plaintiffs seek a declaratory judgment that the Student Conduct Code (Revised: 2002) is overly broad and unconstitutionally vague, as written or as applied, thereby failing to advise the students as to what conduct is prohibited under the Code. Additionally, Plaintiffs seek a declaratory judgment that the disciplinary process at TAMU is constitutionally defective in that it does not provide students with clearly established due process, when the range of sanctions includes expelling, suspending or dismissing the student from the University.

VII.

ATTORNEYS' FEES, COSTS & INTEREST

25. As a result of Defendants' conduct and actions, the undersigned attorneys have been retained by Plaintiffs to prosecute this civil action and protect their constitutional rights. Additionally Plaintiffs have had to advance costs of court and have lost the use of their monies during the pendency of this civil action. Accordingly, Plaintiffs hereby sue for the recovery of reasonable attorneys' fees, costs of court and pre and post judgment interest at the highest rates to which they are entitled.

VIII.

PRAYER

26. WHEREFORE PREMISES CONSIDERED, Plaintiffs hereby pray that Defendants be served with summons, be cited to appear and answer herein, and that after a trial of this matter that Plaintiffs obtain an order enjoining Defendants (in their official

capacities) from violating their Constitutional rights; declaring that the disciplinary procedures utilized by Defendant TAMU is unconstitutional; and ordering Defendants (in their individual capacities) to pay to Plaintiffs their compensatory damages, attorneys' fees, costs of court and prejudgment and post-judgment interest at the highest rates to which they are entitled to receive.

Respectfully submitted,

s/ Ronald G. Hole
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CERTIFICATE OF SERVICE

I, Ronald G. Hole, hereby certify that on this the 25th day of **July 2007,** a true and correct copy of the

above and foregoing document was served upon the following counsel by email notification:

Mr. Russ Harris
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

s/ Ronald G. Hole
Ronald G. Hole

APPENDIX F

[SEAL] **TEXAS A&M UNIVERSITY**
Department of Student Life
Student Conflict Resolution Services

Parsons Mounted Calvary
Separated Students/Students with potential to be separated

Jason Bell	Suspended	Graduation date of August 2003
Adam Blackwelder	Suspended	Anticipated Graduation of May 2004
Nathan Blackwelder	Suspended	Anticipated Graduation of May 2004
Dominic Braus	Suspended	Unsure/ possible Spring 2004 or Fall 2005
Barrett Breedlove	Suspended	Anticipated Graduation of Spring 2005
Robert Crowe	Suspended	Graduation date of August 2003
Mike Fisher	Suspended	Graduated Spring 2003
Mike Fox	Potential Separation	Anticipated Graduation of May 2004
Michael Garza	Suspended	Undetermined graduation date
Eric Gonzalez	Potential Separation	Anticipated graduation of Fall 2004
Jacob Gracia	Suspended	Graduation date of Fall 2003
Mike Griffin	Suspended	Graduation date of August 2003

Brian Higgins	Suspended	Anticipated Graduation of Fall 2004
Bryan Hole	Potential Separation	Anticipated Graduation of Spring 2005
Josh Laughlin	Suspended	Anticipated Graduation of Spring 2004
John Magruder	Suspended	Anticipated Graduation of Fall 2004
Dustin Mills	Suspended	Graduation date of August 2003
Kris Ogerchock	Potential Separation	Anticipated Graduation of Fall 2004
Drake Prowse	Dismissal	Anticipated Graduation of Fall 2003
Will Warden	Potential Separation	Anticipated Graduation of Spring 2005
Lloyd Willis	Suspended	Anticipated Graduation of Fall 2005
Cesar Yarritu	Suspended	Anticipated Graduation of Spring 2004

STUDENT LIFE

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